In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1011

ALVIN S. MICHAELSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The principal question raised by the petition is whether petitioner, an attorney, was required to testify before a grand jury concerning the fee arrangements pertaining to his representation of a client.

Petitioner was convicted in the United States District Court for the District of Nevada of civil contempt for refusing, in violation of 28 U.S.C. 1826, to comply with a court order to answer questions before the grand jury, and was sentenced to imprisonment for the duration of that term of the grand jury.[1] The court of appeals affirmed (Pet. App. A).

The pertinent facts are as follows: Brenda Marie Sibson was called as a witness in a grand jury investigation into hashish smuggling. Although she first claimed indigency and asked to have counsel appointed for her, she thereafter fired her appointed counsel and retained petitioner to represent her. Upon her appearance before

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[1]Petitioner has been admitted to bail pending appeal. The term of the grand jury will continue until the end of this year.

the grand jury, Ms. Sibson was given use immunity pursuant to 18 U.S.C. 6002. Under questioning, she acknowledged accompanying the chief suspect and others on trips abroad, but denied having knowledge of any arrangements made during those trips concerning hashish. She was then asked who arranged and paid for her representation by petitioner. In response, she stated that she made the arrangement, that no one else was paying his fee, and that she had paid him $75. However, Ms. Sibson refused to answer any further questions on the subject on the grounds of attorney-client privilege (Pet. App. A 4).

Petitioner was then subpoenaed and, after his motion to quash was denied, he was given use immunity and was ordered "to give testimony respecting unprivileged communications with his client" (Pet. App. A 4, n. 1). The prosecutor thereupon put nine specific questions to petitioner before the grand jury concerning his fee arrangements with Ms. Sibson, which he refused to answer.[2] The contempt citation followed.

1. The court of appeals correctly affirmed petitioner's adjudication in civil contempt. As the court noted (Pet. App. A 9), absent unusual circumstances, it is well established that the attorney-client privilege does not protect disclosure of the identity of a client, the conditions of employment, the amount of the fee and who paid

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[2]The questions were as follows (Pet. App. A 4-5):

1. Q. Did anyone refer Miss Sibson to you?
2. Q. Did you discuss a fee arrangement with Miss Sibson?
3. Q. Did any other individual besides Miss Sibson ever discuss with you a fee arrangement for your representation of Miss Sibson?
4. Q. What is your fee arrangement with Miss Sibson?
5. Q. How much money have you received from Miss Sibson?
6. Q. Have you received any money from any other person besides Miss Sibson to represent Miss Sibson?
7. Q. Have you received any funds from Miss Sibson?
8. Q. Have you made arrangements with Miss Sibson to pay your expenses?
9. Q. Have you made an arrangement with any other person besides Miss Sibson for the payment of your expenses to represent her?

it. See, *e.g.*, *United States* v. *Cromer*, 483 F.2d 99, 102 (C.A. 9); *In re Semel*, 411 F.2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Wirtz* v. *Fowler*, 372 F.2d 315, 332-333 (C.A. 5); *Colton* v. *United States*, 306 F.2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951; *United States* v. *Pape*, 144 F.2d 778, 782-783 (C.A. 2), certiorari denied, 323 U.S. 752; *Mauch* v. *Commissioner*, 113 F.2d 555, 556-557 (C.A. 3). The specific information requested from petitioner did not relate to a confidential communication from his client. As the court of appeals observed (Pet. App. A 10), the courts have the right to inquire into fee arrangements to protect against suspected conflicts of interest. If an attorney is paid by someone other than his client, there is a possibility that the attorney may in fact be representing the interests of the person making the payment rather than the client. In such circumstances, the court must be able to satisfy itself that no conflict exists and that the attorney is discharging his duty of loyalty to the client. Here, the questions put to petitioner before the grand jury concerning his fee arrangements with Ms. Sibson were for the purpose of determining the identities of other persons participating in hashish smuggling—an inquiry within the proper scope of the grand jury investigation.

2. Contrary to petitioner's assertion (Pet. 20-22), there is no Fifth Amendment privilege available to excuse his refusal to answer the prosecutor's questions concerning his fee arrangements with his client. Assuming *arguendo* that petitioner's answer would have tended to incriminate either himself or his client, the court of appeals noted (Pet. App. A 11) that both of them were granted use immunity prior to the time petitioner was instructed to answer the question. Immunity from use and derivative

use is, of course, sufficient to compel testimony over a claim of the privilege. *Kastigar* v. *United States*, 406 U.S. 441, 453.[3]

Moreover, there is no conflict between the decision below and *United States* v. *Kasmir*, 499 F.2d 444 (C.A. 5), certiorari granted, January 27, 1975, No. 74-611 (Pet. 16-18). There, the court held that the Fifth Amendment could be invoked by an attorney as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's tax returns. In *Kasmir*, the accountant transferred his papers to the claimant who in turn handed them over to his attorney after the commencement of a tax investigation. While we believe the court's decision was erroneous, that decision turned upon the court's conclusion that the privilege against self-incrimination was available to bar the disclosure of the accountant's workpapers rather than upon the fact that the claimant transferred the summoned documents to his attorney. As that court stated, "We reject the motion, as we did in *White* [477 F.2d 757, affirmed *per curiam en banc*, 487 F.2d 1335, certiorari denied, October 15, 1974, No. 73-1308] that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into his attorney's hands" (499 F.2d at 452). And here, by contrast, the grant of use immunity to both the lawyer and the client extinguished any possible availability of the privilege.

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[3]Petitioner (Pet. 9-10) and the *amicus* (Br. 2) argue that the government attorney informed him that his answers to the questions would be used to incriminate his client on the substantive offenses underlying the grand jury investigation, *viz.*, the hashish smuggling. However, quite the contrary is the case. Petitioner was told his answers were sought only with respect to a possible indictment of his client for conspiracy to obstruct justice by giving false testimony to the grand jury and for perjury. Nothing in the immunity statute, 18 U.S.C. 6002, prevents the bringing of such charges, for that statute explicitly excepts prosecutions for "perjury, giving a false statement, or otherwise failing to comply with the order [to testify]." If petitioner's client made false statements to the grand jury, she has no Fifth Amendment privilege to prevent him from testifying as to information which did not relate to a confidential communication from her, even if his testimony may establish the falsity of her statements.

Contrary to petitioner's argument (Pet. 14), the Sixth Amendment right to counsel has never been construed to bar disclosure of all evidence in the hands of an attorney. Thus, the mere fact that petitioner has certain information which came into his possession while acting as an attorney does not automatically insulate it from disclosure unless either the Fifth Amendment or the attorney-client privilege is available. Since the court below correctly concluded that neither privilege was applicable, *Kasmir* is distinguishable.[4]

3. Finally, petitioner urges (Pet. 31-35) that the requirement of 28 U.S.C. 1826 that appeals from civil contempt orders be disposed of within 30 days deprived him of due process of law. The purpose of the civil contempt remedy, which is to encourage compliance with court orders, justifies the expedited procedure established by the statute. If appeals from civil contempt orders consumed long periods of time, the efficacy of court orders would be undermined even if the orders ultimately were held to be valid. Although the briefing schedule in such a case is curtailed, petitioner was not forced to work under more stringent time limitations than the government. While this schedule had the effect of foreclosing petitioner from seeking rehearing *en banc*, it did not preclude him from seeking *en banc* consideration as an initial matter.

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[4]Petitioner also argues (Pet. 24) that the decision below is in conflict with *Colton* v. *United States*, 306 F.2d 633, 636 (C.A. 2), certiorari denied, 371 U.S. 951. There, the court held, *inter alia*, that questions of attorney-client privilege in a federal income tax investigation are matters of federal law. In so holding, the court expressly disagreed with the Ninth Circuit's decision in *Baird* v. *Koerner*, 279 F.2d 623, which, like the decision below, looked to the state law concerning the privilege. But this case is not appropriate for resolution of the asserted conflict because petitioner makes no showing that federal law would have yielded a different result. Indeed, petitioner concedes (Pet. 24, n. 14) that "[t]he laws of California, Nevada, and the Federal Courts are nearly identical with respect to the extent of the attorney-client privilege."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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